



July 6, 2000

Ms. D'Ann Nichols Drennan  
Taylor, Olson, Adkins, Sralla  
& Elam, L.L.P.  
500 Throckmorton Street  
3400 Bank One Tower  
Fort Worth, Texas 76102-3821

OR2000-2533

Dear Ms. Drennan:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 137321.

The City of Azle (the "city"), which you represent, received a request for three categories of information related to a sexual harassment investigation. Specifically, the requestor seeks information concerning the internal police investigation into the harassment allegations, a copy of the accused's application for employment and resume, and information concerning a report made by an "outside investigating firm" of the harassment allegations. You claim that portions of the information are excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup>

The city asserts that the information contained in Tabs 1, 2A, and 3 is excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103 requires concrete evidence that

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<sup>1</sup>We note that we also reviewed and considered submissions made by the requestor.

litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You supplied this office with a copy of a Notice of Claim from the attorney representing the alleged victim of the sexual harassment. We find, therefore, that litigation is reasonably anticipated. Further, we conclude that the requested documents are directly related to the anticipated civil litigation. Therefore, you may withhold the information contained in Tab 1 pursuant to section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The documents submitted under Tab 2A appear to have been provided to the city by the opposing party; thus, you may not withhold the documents contained in Tab 2A under section 552.103.<sup>2</sup>

Additionally, section 552.022(a)(1) of the Government Code requires the public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]” The documents submitted under Tab 3 appear to be a completed report or investigation made for the city by an independent firm. The city asserts that this information, as well as the information contained in Tab 2A, is excepted from disclosure under section 552.108. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov’t Code §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that “at the time the investigation was conducted, it was possible that the City would discover criminal conduct.” However, we note that this investigation does not appear to be of a criminal nature. Investigations into non-criminal matters are not excepted from disclosure by Government Code section 552.108. *Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). We conclude that you have not demonstrated how the subject information deals with the detection, investigation, or prosecution of crime or

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<sup>2</sup>We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

how its release would interfere with detection, investigation, or prosecution of crime. Therefore, the city may not withhold the information submitted under Tabs 2A or 3 under section 552.108.

You also claim that the information found under Tabs 2A and 3 is excepted from disclosure under section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to her client. Only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions is excepted from public disclosure by section 552.107; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5. (1990). Section 552.107(1) does not except purely factual information from disclosure, nor does it protect information gathered by an attorney as a fact-finder. Open Records Decision Nos. 574 (1990), 559 (1990), 462 (1987). The city asserts exception under section 552.107 generally, but makes no specific arguments in support of its assertion. We have reviewed the materials submitted and conclude that the information contained in Tab 2A reflects communications made to the city by the opposing party. The information contained in Tab 3 consists of a fact summary developed out of an investigation. Thus, we find that the city may not withhold Tabs 2A or 3 under section 552.107(1).

However, section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” The common law right of privacy is incorporated into the Public Information Act by section 552.101. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the right of common law privacy to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Based upon the submitted information, we conclude that Tab 3 contains an adequate summary of the sexual harassment complaint investigation; therefore, the alleged victim's and witnesses' statements contained within Tab 2A must be withheld under section 552.101. Further, based on *Ellen*, the city must withhold the alleged victim's and the witnesses' identifying information from the summary found under Tab 3. We have marked those portions of Tab 3 that must be withheld from required public disclosure under section 552.101.

You also assert that the highlighted information contained in Tab 4, the accused's application for employment with the city, is excepted under section 552.024. Section 552.117 of the Government Code requires that you withhold the home address, telephone number, social security number, or information revealing whether a public employee has family members, of a public employee or official who requests that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (199), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). In the instant case, if the accused has elected not to allow public access to this information in accordance with the procedures of section 552.024, the city must withhold this information from required public disclosure pursuant to section 552.117. We agree with the redactions you have made on the document contained in Tab 4.<sup>3</sup>

In summary, Tab 1 may be withheld under section 552.103. Tab 2A must be withheld under section 552.101 and common law privacy. Tab 3 must be released, pursuant to section 552.022(a)(1); however, the alleged victim's and the witnesses' identifying information must be redacted prior to release. The highlighted portions of Tab 4 must be withheld under section 552.117, if a proper election under section 552.024 was made prior to the request for information. Finally, all Texas driver's license numbers, license plate numbers, and VIN numbers must be withheld under section 552.130.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

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<sup>3</sup>Please note that section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, you must withhold all Texas driver's license numbers, license plate numbers and VIN numbers. We have marked the type of information that the city must withhold.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Amanda Crawford".

Amanda Crawford  
Assistant Attorney General  
Open Records Division

AEC/nc

Ref: ID# 137321

Encl. Submitted documents

cc: C.M. Miller  
P.O. Box 360  
Azle, Texas 76098  
(w/o enclosures)